

6-1-1993

Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations

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Recommended Citation

Kurt A. Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 Loy. L.A. L. Rev. 1291 (1993).

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LOCKED AND LOADED: TAKING AIM AT THE GROWING USE OF THE AMERICAN MILITARY IN CIVILIAN LAW ENFORCEMENT OPERATIONS

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Cry "havoc," and let slip the dogs of war.¹

I. INTRODUCTION

On the evening of May 2, 1992, Marvin Rivas tried for the second time to drive his battered Datsun through a United States Army roadblock.² The soldiers stationed at the roadblock were members of the California Army National Guard's 40th Infantry Division (Mechanized), and they had been on the streets of Los Angeles since rioting began four days earlier.³ California Governor Pete Wilson had called the troops from their civilian⁴ lives to active duty just hours after the Rodney King verdict had sparked widespread chaos throughout the city.⁵

The soldiers were manning their blockade in the Pico-Union district, an area in which the rioting had been particularly severe.⁶ Rivas drove rapidly toward the nervous troops, ignoring their orders to stop and forcing one soldier to leap out of the path of the speeding car.⁷ Three soldiers locked and loaded⁸ their M16A1 assault rifles, took aim and fired.⁹ Rivas was hit in the head and arm.¹⁰ The mortician who prepared Rivas's body for the open-casket funeral placed a baseball cap on his head to cover the bullets' damage.¹¹

1. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 1.

2. Paul Feldman, *Faces of Death: 10 Men Slain by Officers in Riots*, L.A. TIMES, May 24, 1992, at A1, A25. Unknown to the soldiers, Rivas was an immigrant from El Salvador who was reputed to be a drug dealer in the Pico-Union area. *Id.* One witness described Rivas as having participated in acts of looting earlier in the riots. *Id.*

3. Greg Seigle, *Civil Wars: Police Praise Guard's L.A. Performance*, ARMY TIMES, May 18, 1992, at 12.

4. This Comment uses the term "civilian" to describe all persons or institutions not under military control. For example, a police officer would be considered a civilian.

5. See Seigle, *supra* note 3.

6. See Feldman, *supra* note 2.

7. *Id.*

8. "Locked and loaded" is a slang term used by soldiers to describe a weapon that has a magazine locked in place and a bullet loaded in the chamber. A locked and loaded weapon is ready to fire.

9. See Feldman, *supra* note 2, at A25.

10. See Tracy Wilkinson, *In Pico-Union, Refugees Land in a New War Zone*, L.A. TIMES, May 11, 1992, at A1, A12.

11. See Feldman, *supra* note 2.

If the shooting had taken place in a combat zone there would have been little comment, perhaps only a routine report to the soldiers' higher headquarters. But this took place in an American city, and though it was not wartime, the United States' military was engaged in combat operations on the streets of Los Angeles.¹²

The deployment of military forces in Los Angeles is a recent example of the growing willingness of political leaders to commit military forces to "civilian support missions"¹³ within the borders of the United States. This change comes as some commentators put forth the view that the downfall of the Soviet Union and the disintegration of the communist bloc have left the United States with a massive military structure and only limited defense interests overseas.¹⁴ At the same time, the American people have renewed confidence in their military because of its superb performance in the Gulf War.¹⁵ This has led prominent Americans to encourage the use of the military to solve intractable domestic problems.¹⁶ Some look at the military as an example of, and potential engine for, social change.¹⁷ Others see the military's unparalleled organizational, logistical and human resources as ideal tools with which to respond to natural disasters.¹⁸ Together, these views raise the specter of a greatly increased role for the military within civilian society.

12. See *infra* part III.C.3.

13. When used in this Comment, the term "civilian support missions" refers to any operations in which armed military forces operate in conjunction with civilian organizations to realize a goal traditionally understood to be within the province of civilian law enforcement agencies. These missions include involvement in anti-drug operations (such as smuggling interdiction efforts), control of the nation's borders, and maintaining order in cities and disaster areas. See *infra* text accompanying notes 23-25.

14. Jeff Greenfield, *Rethinking the Formula*, L.A. TIMES, Jan. 10, 1993, at M1; Jed C. Snyder, *Must the U.S. Disengage?*, NAT'L REV., Nov. 16, 1992, at 29; see also Laureen Lazarovici, *Di Flies, Barbara Plummets*, L.A. WEEKLY, Oct. 23, 1992, at 28 (detailing Senate candidate Diane Feinstein's advocacy of domestic use of military); Soraya S. Nelson & Jim Wolfe, *New Military Mission Could Surface in Andrew's Wake*, ARMY TIMES, Sept. 7, 1992, at 17 (describing policy debate on role of military).

15. Thomas Ferraro, *One Year After Iraqi Invasion*, UPI, Aug. 2, 1991, available in LEXIS, Nexis Library, UPI File (finding that majority of American citizens have high level of confidence in military).

16. See Greenfield, *supra* note 14; Melissa Healy & Sheryl Stolberg, *Hurricane Relief Blows Winds of Change for Military*, L.A. TIMES, Sept. 11, 1992, at A24; Nelson & Wolfe, *supra* note 14; Thomas E. Ricks, *Colonel Dunlap's Coup*, THE ATLANTIC, Jan. 1993, at 23; see also Lazarovici, *supra* note 14 (describing politician's support for domestic use of military).

17. See Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for Its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151, 211 (1992) (arguing that inclusion of lesbians and gays in military would benefit nation); Melissa Healy, *New Set of Marching Orders*, L.A. TIMES, Nov. 2, 1992, at A1 (discussing strengthening military-civilian connections).

18. See Nelson & Wolfe, *supra* note 14.

While the military has earned respect for its actions in foreign wars,¹⁹ the Founders of the United States²⁰ as well as the English in previous centuries²¹ were horrified by the idea of using the military within civil society. Unlike the politicians of today, the Founders and their English ancestors recognized that the military must remain outside of civilian society.

Controlling civil disturbances, as in Los Angeles, is but one domestic role the military has played in recent years.²² Armed military forces also have provided security and logistical assistance during natural disasters such as Hurricane Andrew in Florida and Louisiana in 1992,²³ and have assisted with drug interdiction²⁴ and immigration control by patrolling U.S. borders.²⁵ At times, the military has even provided added firepower to outgunned law enforcement officers.²⁶

Explaining why the military should stand aside as problems grow out of control would make a poor sound bite for a politician. Allowing

19. *Id.*

20. See David E. Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 18-31 (1971).

21. *Id.* at 2-18.

22. Authorities continue to plan for the use of military forces in civil disturbance operations. See Carla Rivera, *National Guard Stages Show of Riot Readiness*, L.A. TIMES, Feb. 18, 1993, at A1, A3.

23. See Greg Seigle, *To the Rescue: Army Provides Comfort to Hurricane Victims*, ARMY TIMES, Sept. 7, 1992, at 16.

24. See H.R. REP. NO. 71, 99th Cong., 2d Sess., pt. 2, at 3 (1986) (describing legislation enabling military to provide greater support to drug interdiction efforts); see also Greg Seigle, *California Vice: National Guard Unit Fights the Drug War from the Front Lines*, ARMY TIMES, Nov. 9, 1992, at 11 (describing California Army National Guard operations against drug smugglers); *U.S. Agents Arrest 10, Seize Ton of Cocaine*, L.A. TIMES, Aug. 16, 1992, at A13 (discussing use of military aircraft to track drug planes).

25. See, e.g., Melissa Healy, *U.S. Military Will Shelter Haitians at Base in Cuba*, L.A. TIMES, Nov. 26, 1991, at A1 (describing mobilization of troops to run camp for Haitian refugees caught by Coast Guard during attempted illegal entry into United States); John H. Lee, *Bank of Lights Planned to Deter Border Activity*, L.A. TIMES, Sept. 10, 1992, at A1 (discussing Army plan to build floodlights to deter illegal border crossing); Lee Romney, *U.S. Erects Last Strip of Border Fence*, L.A. TIMES (San Diego County ed.), Aug. 15, 1992, at B1 (describing ten-foot fence built by Army reservists along U.S.-Mexican border); cf. Lazarovici, *supra* note 14 (discussing Senate candidate Dianne Feinstein's support for using military forces to patrol U.S.-Mexican border); Larry Speer, *Gallegly Advocates Troops at Borders*, L.A. TIMES (Valley ed.), June 19, 1992, at B2 (discussing Representative Elton Gallegly's request for 10,000 troops to patrol border); Tracey Wilkinson, *Candidates Tough on Illegal Immigration*, L.A. TIMES, Oct. 19, 1992, at A3 (discussing Feinstein's support for using military forces to patrol border).

26. See Stephen Braun & Richard A. Serrano, *Siege Continues at Texas Cult Site*, L.A. TIMES, Mar. 2, 1993, at A1, A14. The military supplied Bradley armored personnel carriers to federal agents surrounding a fortified cult headquarters in Waco, Texas. *Id.* Later, federal authorities brought in M1 Abrams tanks after the cult leader threatened to destroy the Bradleys. Louis Sahagun, *'Ready for War,' Defiant Leader of Cult Tells FBI*, L.A. TIMES, Mar. 9, 1993, at A1.

the Air Force to track drug smuggling aircraft seems a small violation of tradition.²⁷ Letting the Navy house Haitian immigrants²⁸ seems like a practical use for bases that are standing idle. Using Army soldiers to patrol the border with Mexico appeals to some as a simple solution to the complex problem of illegal immigration, especially in election years.²⁹ When natural disaster strikes, leaving support troops on their bases when they could be providing assistance to fellow Americans seems unreasonable. Such benign success stories inevitably lead to calls for greater intervention.

However, these are the first steps down a dangerous path. Unlike civilian society, with its democratic claim to legitimacy and its emphasis on individual rights and procedural justice, the military was, and is, a unique institution that achieves its goals through the use and threat of force.³⁰ It should not be surprising that when the military is ordered to act in the civilian arena it is ill-prepared to respond.³¹

The military is designed, organized and equipped to effect the rapid, violent and efficient destruction of the "enemy," whoever that may be.³² Military methods are not designed to handle the shades of gray that a police officer encounters on the beat, but are tailored to the stark black and white of a battlefield. Still, the troops are expected to efficiently and forcefully accomplish their mission while operating within the constraints of civilian society.³³

Civilian law expects troops to conform their behavior to the dictates of terms of art that do not exist in a military vocabulary. For example, troops must assess whether the use of force is "reasonable"³⁴ and avoid

27. See *U.S. Agents Arrest 10, Seize Ton of Cocaine*, *supra* note 24.

28. See Healy, *supra* note 25.

29. See Lazarovici, *supra* note 14; Wilkinson, *supra* note 25; see also Speer, *supra* note 25 (discussing Representative Elton Gallegly's request for 10,000 troops to patrol border).

30. "The overriding mission of US forces is to deter war. The US Army supports that mission by providing combat ready units to the unified and specified commands which are charged with executing the military policies of the United States and waging war should deterrence fail." U.S. ARMY, FIELD MANUAL 100-5: OPERATIONS 1 (May 5, 1986).

31. See *infra* parts III-IV.

32. See U.S. ARMY, FIELD MANUAL 7-10: THE INFANTRY RIFLE COMPANY 1-1 (Dec. 14, 1990) [hereinafter FIELD MANUAL 7-10] (explaining that Army mission is to kill enemy soldiers, destroy enemy equipment and shatter enemy's will to resist).

33. Cf. Greg Seigle, *Troops Take Crash Course in Riot Control*, ARMY TIMES, May 18, 1992, at 16 (describing how heavily armed soldiers were deployed in Los Angeles with orders to end rioting).

34. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 20-21 (1985) (requiring peace officers to apply test to determine if shooting fleeing suspect is justifiable).

violating the "civil rights"³⁵ of civilians who the military forces, once deployed on American streets, come to view as the enemy. Such a dichotomy invites confusion and tragedy.³⁶

The use of troops in Los Angeles was a reminder that when military forces are used in law enforcement operations there is always the possibility that deadly force may be used.³⁷ That concern is heightened by the nature of the military's likely opponents. Rioters, drug smugglers and looters are often armed and dangerous, and many individuals arrested in civil disturbances have later been found to have criminal records.³⁸ But potentially dangerous civilians are not the only ones the military will encounter. If soldiers become a common sight on the streets of America, these issues will concern every American.

There have been instances in which the results of troop deployments have been positive. In Los Angeles, some citizens in riot-torn areas "smiled, waved and beeped their car horns at passing convoys of soldiers."³⁹ However, in other instances the results have been tragic, such as the infamous killing of four students at Kent State University by soldiers of the Ohio National Guard in 1970.⁴⁰ The purpose of this Comment is to survey the issues that an increased domestic role for the military raises and to provide a warning that the issue of the military's role within civil society warrants careful consideration by those who seek to expand that role.

35. Many cases involving allegations of the unjustified use of deadly force by state officials are brought as federal civil actions to recover damages for the unlawful deprivation of the plaintiff's civil rights. See 42 U.S.C. § 1983 (1988); see, e.g., *Garner*, 471 U.S. at 12-13 (holding that police use of deadly force violated plaintiff's right to be free from unlawful seizure); *Krause v. Rhodes*, 570 F.2d 563, 572 (6th Cir. 1977), cert. denied, 435 U.S. 924 (1978) (alleging that National Guard's use of deadly force violated due process rights and right against cruel and unusual punishment). Plaintiffs can also press "*Bivens* claims" against federal officials for civil rights violations. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

36. The effect that an expanded domestic role would have on the military, as an institution, is beyond the scope of this Comment. Consequently, though it is currently the subject of great debate within military circles, the issue of the potentially damaging effects that an increased emphasis on domestic roles would have on the military will not be considered here. For discussions of this issue, see William Matthews, *Critics Say Stay-At-Home Role Will Hamper Readiness*, ARMY TIMES, Oct. 26, 1992, at 24; Ricks, *supra* note 16, at 23-25; Harry G. Summers, Jr., *Roots of the Coup of 2012 Lie in 1992*, L.A. TIMES, Dec. 2, 1992, at B7.

37. The author does not suggest that the shooting of Marvin Rivas by California Army National Guard troops was in any way improper or unjustified.

38. See Sidney Fine, *Rioters and Judges: The Response of the Criminal Justice System to the Detroit Riot of 1967*, 33 WAYNE L. REV. 1723, 1723 (1987).

39. See Seigle, *supra* note 3, at 15.

40. See generally REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 233-410 (1970) [hereinafter CAMPUS UNREST] (describing Kent State shootings).

This Comment begins by briefly exploring the tradition against the use of the military within the domestic arena,⁴¹ describing how the training and equipment of the troops make them inappropriate for the civilian support role.⁴² It next reviews the cases stemming from past civilian support missions and finds that the executive power to employ military forces domestically presents extremely difficult problems for the judiciary.⁴³ This Comment then explores the immunity privileges of the government, civilian officials and military personnel.⁴⁴ It concludes that the balance the courts have struck between the necessity for freedom of action and the protection of the citizenry benefits neither the troops nor the civilian populace. Finally, this Comment recommends that the nation resist the temptation to rely on the armed forces to solve its internal problems.

II. HISTORICAL PERSPECTIVES ON THE DOMESTIC EMPLOYMENT OF MILITARY FORCES

A. *The Tradition Against Domestic Use of the Military*

The domestic use of military forces was a source of controversy long before the first English colonist set foot on American soil. The history of England includes frequent occasions of the King's subjects acting, sometimes violently, to limit royal power to employ the military internally.⁴⁵

Much of colonial American history similarly revolves around this issue. For example, a key incident leading to the American Revolution was the Boston Massacre of 1770,⁴⁶ in which English troops fired into an unruly crowd and killed five American colonists.⁴⁷ That tragedy helped spark the revolution that began at Concord Bridge five years later.⁴⁸ It was there at Concord that armed American colonists first fought the hated "Redcoats," British soldiers attempting to enforce the Crown's authority over the civilian populace.⁴⁹ The use of military forces by the Crown was a key grievance cited by the Founders in the Declaration of Independence.⁵⁰

41. *See infra* part II.

42. *See infra* part III.

43. *See infra* part IV.

44. *See infra* part IV.

45. *See* Engdahl, *supra* note 20, at 2-18.

46. *Id.* at 24-25.

47. *Id.*

48. *See id.*

49. *Id.* at 27.

50. Speaking about the British monarch, Thomas Jefferson wrote: "He has affected to render the Military independent of, and superior to the Civil Power." THE DECLARATION OF

B. *Limits on Domestic Use of the Military*

The Founders of the United States experienced firsthand the potential uses of a standing army in the hands of a tyrant. In response, they instead placed their faith in a militia drawn from the citizenry.⁵¹ Today, the militia is defined by statute as "all able-bodied males at least 17 years of age and . . . under 45 years of age" who either are United States citizens or intend to become citizens, as well as female commissioned officers of the National Guard.⁵² The organized branch of the militia is today's National Guard.⁵³ Along with the active duty forces of the Army and the Marine Corps,⁵⁴ the National Guard is the force most likely to come in contact with American civilians because Air Force and Navy personnel generally conduct operations either in the air or at sea.

The Posse Comitatus Act regulates the use of federal military forces in law enforcement.⁵⁵ Congress passed the Act in response to the use of federal soldiers for routine law enforcement in the occupied South during the Reconstruction Era.⁵⁶ The Act made the use of federal troops in routine law enforcement a crime punishable by two years in prison, a \$10,000 fine or both.⁵⁷

The law does not prohibit all military action in support of civilian law enforcement, but allows such uses "in cases and under circumstances expressly authorized by the Constitution or Act of Congress."⁵⁸ These

INDEPENDENCE para. 14 (U.S. 1776); *see also id.* paras. 15, 24-26 (listing Colonists' grievances against British Crown).

51. *See* Engdahl, *supra* note 20, at 18-27; THE FEDERALIST No. 29, at 183 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

52. 10 U.S.C. § 311(a) (1988).

53. *Id.* § 311(b).

54. Active duty forces consist of personnel who perform "full-time duty in the active military service of the United States." 10 U.S.C. § 101(22) (1988). Reserve forces, like the National Guard, are composed of personnel who typically serve one weekend per month plus two full weeks per year on active duty. *See id.* § 101(33); 32 U.S.C. § 270 (1988); *id.* § 502.

55. 18 U.S.C. § 1385 (1988).

56. James P. O'Shaughnessy, Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703, 704-10 (1976).

57. 18 U.S.C. § 1385.

58. *Id.*; *see also* Employment of Military Resources in the Event of Civil Disturbances, 32 C.F.R. § 215.4 (1991) (setting guidelines for domestic use of military forces). There are two exceptions to the Posse Comitatus Act based upon "the inherent right of the U.S. Government . . . to insure the preservation of public order and the carrying out of governmental operations within its territorial limits." *Id.* § 215.4(c)(1). These exceptions to the Posse Comitatus Act give the President the "emergency authority" to restore order and to protect federal functions and property. *Id.* § 215.4(c)(1)(i)-(ii); *see also* 10 U.S.C. §§ 331-333 (1988) (describing requirements for President's domestic use of federal troops); H.R.J. Res. 1292, 82 Stat. 170 (1968), *cited in* 32 C.F.R. § 215.4(c)(2) (authorizing domestic use of troops for certain law enforcement missions).

situations include quelling insurrections⁵⁹ as well as operations to ensure federal laws are being enforced.⁶⁰ In recent years, Congress has attempted to force a generally unwilling Pentagon toward a more active role in the fight against drugs,⁶¹ as well as an increased responsibility for disaster relief operations.⁶²

The Posse Comitatus Act does not apply to all military forces, however. The Coast Guard is not included under the Act,⁶³ nor is the National Guard when it is under state control.⁶⁴ While the various state National Guard forces are trained⁶⁵ and regulated⁶⁶ according to federal standards,⁶⁷ they remain under the command of the state governor who may freely use them in law enforcement operations until federalized by the President as authorized by statute.⁶⁸ For example, the State of California currently uses its National Guard forces in such a manner: "Task Force Grizzly" operates surveillance positions along suspected drug smuggling routes from Mexico, passing information on to civilian law enforcement officials.⁶⁹ Thus, the Posse Comitatus Act serves to limit, but does not flatly prohibit, the use of military forces within the domestic arena.⁷⁰

C. *Instances of Domestic Use of Military Forces*

In spite of the Founders' warnings and Congress's attempt to codify those misgivings in the Posse Comitatus Act,⁷¹ throughout American

59. U.S. CONST. art. I, § 8, cl. 15; *id.* art. IV, § 4. There have been a number of occasions when the military was called forth to battle insurrections. These include Shay's Rebellion (from 1786 to 1787), the Whiskey Rebellion (in 1794), and the Dorr Rebellion (in 1842). See Engdahl, *supra* note 20, at 49 nn.236-38 (listing occasions of domestic use of military forces). From 1861 to 1865, the military, of course, also fought in the Nation's bloodiest conflict, the American Civil War.

60. 10 U.S.C. § 332.

61. See Matthews, *supra* note 36.

62. See Nelson & Wolfe, *supra* note 14.

63. During peacetime, the Coast Guard is a part of the Department of Transportation. 14 U.S.C. § 1 (1988). Its commissioned officers are considered United States Customs Service officers. *Id.* § 143 (1988); 19 U.S.C. § 1401(i) (1988).

64. See THE CITY IN CRISIS: A REPORT BY THE SPECIAL ADVISOR TO THE BOARD OF POLICE COMMISSIONERS ON THE CIVIL DISORDER IN LOS ANGELES 152 (1992) [hereinafter WEBSTER REPORT] (discussing status of California Army National Guard soldiers under Posse Comitatus Act during Los Angeles Riots).

65. See 32 U.S.C. § 502 (setting training standards for National Guard personnel).

66. See *id.* § 110 (giving President authority to regulate organization and discipline of National Guard forces).

67. U.S. CONST. art. I, § 8, cl. 16.

68. 10 U.S.C. § 333.

69. See Seigle, *supra* note 24, at 10.

70. See *supra* note 58.

71. See *supra* part II.B.

history, military forces have often been used to achieve domestic goals. Some cases involved civil disturbances during peacetime,⁷² while others occurred in the context of larger conflicts, such as the American Civil War and World War II.⁷³ Although the goals of civilian support operations vary, they share a common feature: The civilian government uses military forces to perform functions the civilian government is unable to successfully accomplish itself.

1. Domestic use of military forces during peacetime

Both federal troops and the military forces of the states—called to active service by state governors—have been used in peacetime domestic actions. In their capacity as commanders in chief, state governors have often called out state military forces to quell violent civil disorder,⁷⁴ but litigation may result from the strong actions that the military forces take to complete their missions. For example, in *Moyer v. Peabody*,⁷⁵ a union official unsuccessfully sought recovery from the former Governor of Colorado and officers of the Colorado National Guard.⁷⁶ The Governor had declared a county in the midst of a violent labor dispute “to be in a state of insurrection.”⁷⁷ Soldiers had arrested and imprisoned the plaintiff without charge, believing him an instigator of the violence.⁷⁸

The call-up of the Pennsylvania National Guard that formed the background of *Commonwealth ex rel. Wadsworth v. Shortall*⁷⁹ also resulted from a violent strike.⁸⁰ In *Shortall*, a soldier was charged with killing a civilian while on sentry duty.⁸¹ The defendant soldier was charged with the killing, but was released after the court found that the homicide was justified by the martial rule in effect at the time.⁸²

In yet another instance of military forces operating in civil society, the Governor of Texas called out his state's National Guard during what

72. See *infra* part II.C.1. In the future, cases stemming from military disaster relief operations would fit within this category because military forces may be called upon to provide armed security operations as they were in Florida and Louisiana following Hurricane Andrew in August and September of 1992. See Seigle, *supra* note 23, at 16. Included would be such activities as drug interdiction and border patrolling. See *supra* notes 24-25 and accompanying text.

73. See *infra* part II.C.2.

74. See *infra* text accompanying notes 75-86.

75. 212 U.S. 78 (1909).

76. *Id.* at 82-83, 86.

77. *Id.* at 82.

78. *Id.* at 82-83.

79. 55 A. 952 (Pa. 1903).

80. *Id.* at 953.

81. *Id.*

82. *Id.* at 957-58.

he characterized an "insurrection" in the oil fields.⁸³ He had his forces seize the wells after declaring "martial law."⁸⁴ However, the United States Supreme Court found that the Governor's action—though not his original declaration of a state of insurrection—was reviewable by federal courts and upheld an injunction on Governor Sterling's actions.⁸⁵ The action of the Governor in the dispute over oil well production seemed to stem more from expedience than any actual need to use military force.⁸⁶

2. Domestic use of military forces during wartime

During wartime and its immediate aftermath, the federal government appears more willing to use the military internally than in peacetime. For example, the plaintiff in *Ex parte Milligan*⁸⁷ was a civilian arrested in Indiana by federal troops during the Civil War.⁸⁸ Milligan was tried by a military court martial and sentenced to hang as a Southern sympathizer even though civilian courts were still functioning in the area.⁸⁹ The Court ordered Milligan's release.⁹⁰

The Second World War and fear of actual invasion led to two cases in which military forces operated domestically and in direct conflict with the norms of civil society. During World War II, military authorities in Hawaii tried civilians accused of purely civilian crimes until the Supreme Court ended the practice by overturning the embezzlement conviction of the defendant in *Duncan v. Kahanamoku*.⁹¹ However, the Court upheld a military order excluding all those of Japanese ancestry from the West Coast in *Korematsu v. United States*.⁹²

President Truman called the military into the domestic arena during wartime, which led to the decision in *Youngstown Sheet & Tube Co. v. Sawyer*.⁹³ In 1952, during the height of the Korean War, a frustrated

83. *Sterling v. Constantin*, 287 U.S. 378, 391 (1932).

84. *See id.* at 402-03. Martial law occurs when the processes and procedures of civil society are suspended during a period of crisis and replaced by a system of governance by military decree. *See id.*; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118-31 (1866). The threat of danger to the public justifies the executive's usurpation of judicial process. *See Keely v. Sanders*, 99 U.S. 441, 446 (1878). However, civilian judicial process cannot be denied to civilians while civil courts are open and functioning. *Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946); *Milligan*, 71 U.S. at 127-29; *Shortall*, 55 A. at 954.

85. *Sterling*, 287 U.S. at 392-93.

86. *Id.* at 396-97.

87. 71 U.S. (4 Wall.) 2 (1866).

88. *Id.* at 107-08.

89. *Id.*

90. *Id.* at 131.

91. 327 U.S. 304 (1946).

92. 323 U.S. 214 (1944).

93. 343 U.S. 579 (1952).

President Truman ordered the military to seize steel mills shut down by a labor dispute.⁹⁴ The Supreme Court, however, found that the President had no constitutional or statutory power to take such an action.⁹⁵ Once again, the executive tried to use the military to do what could not be done otherwise.

III. MILITARY FORCES IN CIVILIAN SOCIETY

The military is not suited to operate within the domestic arena while civil authority still exists. It is no accident that the civilian justice system is entirely different from the military justice system, with its own procedures and code of sometimes arcane offenses applicable only to military personnel.⁹⁶ To function, the military must literally play by its own rules. Those rules include not only the regulations by which the military operates but convey the military mindset as well. At the core, the military is not a police organization. It is not organized as such, nor properly equipped, nor are its members extensively trained for such duty.⁹⁷ Further, the military achieves its goals through the use of force,⁹⁸ while peace officers view force as a last resort.⁹⁹

A. *Military Forces and Police Agencies: Crucial Distinctions*

1. The role of peace officers

The purpose of peace officers is to maintain order within civilian society, and they are authorized to use force to perform their duties. However, the force used must be reasonable and used only as a last resort,¹⁰⁰ though some states have authorized the use of deadly force as a

94. *Id.* at 582.

95. *Id.* at 585-89.

96. See, e.g., Missing Movement, 10 U.S.C. § 887 (1988) (U.C.M.J. art. 87) (punishing soldier for failing to embark with unit when ordered); Subordinate Compelling Surrender, *id.* § 900 (U.C.M.J. art. 100) (providing death penalty for military personnel who compel unit commander to surrender); Improper Use of Countersign, *id.* § 901 (U.C.M.J. art. 101) (imposing death penalty on those who knowingly transmit passwords to enemy during wartime); Malingering, *id.* § 915 (U.C.M.J. art. 115) (punishing personnel that feign illness or injure themselves to avoid duty).

97. See *infra* part III.C.4.

98. See FIELD MANUAL 7-10, *supra* note 32, at 1-1.

99. See Seigle, *supra* note 24, at 17. As part of Task Force Grizzly, the California Army National Guard's anti-narcotics effort, squads of soldiers work closely with law enforcement officers during surveillance operations. Nevertheless, the difference between the civilian and military personnel is apparent: "The California Guard scouts, whose military training taught them how to use overwhelming force, must follow the lead of the Border Patrol agent, who is trained to use force only as a last resort." *Id.*

100. See *infra* notes 157-60 and accompanying text.

means to quell riots.¹⁰¹ Today, deadly force is only to be used in self-defense, or, if necessary, to prevent harm to others or to stop the flight of a dangerous felon.¹⁰²

2. The role of military forces

Soldiers are not trained peace officers, and that distinction is crucial. The mission of an infantry unit is "to close with the enemy to kill him, destroy his equipment, and shatter his will to resist,"¹⁰³ which is hardly the role of a peace officer. In spite of this, among the first troops on the streets of Los Angeles in 1992 were infantrymen¹⁰⁴ of the California Army National Guard's 40th Infantry Division (Mechanized).¹⁰⁵

Troops generally undertake domestic missions with the same gear they carry into battle. The typical infantryman is armed with a rifle and bayonet.¹⁰⁶ Sometimes, though, soldiers are armed with crew-served machine guns and other heavy weapons in civilian assistance missions.¹⁰⁷ In civil disturbance operations, troops also carry what the soldiers in the 1992 riots called "L.A. Gear:" an armored "flak vest"¹⁰⁸ and a kevlar helmet with a riot face shield.¹⁰⁹

101. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 20-21 (1985) (setting reasonableness standard for use of deadly force by peace officers). Individual states have differing standards for the use of deadly force by police officers. See *id.* at 16 nn.14-21.

102. *Id.* at 11-12. Even within the limits of the reasonableness standard, some law enforcement agencies specially arm their officers for situations in which violence is considered especially likely. See, e.g., *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975). However, the legal requirement of reasonableness in the use of force applies to peace officers even when they are involved in volatile situations. See *id.* at 1271, 1278 (discussing situation in which heavily armed police officers killed two innocent students during disturbance at college campus); *supra* part II.C.

103. FIELD MANUAL 7-10, *supra* note 32, at 1-1.

104. Because the combat-exclusion policy of the Department of the Army prohibits women from assignment to positions in infantry units, infantry soldiers will be referred to within this Comment as "infantrymen."

105. Greg Seigle, *Waiting Around, Ready To Go*, ARMY TIMES, May 18, 1992, at 15.

106. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 502 (1968) [hereinafter KERNER COMMISSION]. The weapons carried today are M16A1 and M16A2 assault rifles. U.S. ARMY, FIELD MANUAL 23-9: M16A1 AND M16A2 RIFLE MARKSMANSHIP, at 2-2 (July 3, 1989) [hereinafter FIELD MANUAL 23-9]. The M16A1 has the capacity for fully automatic fire, while the M16A2 has a three-round burst capability. *Id.* Both weapons use 20-round or 30-round magazines. *Id.*

107. During the riots of the 1960s, troops sometimes deployed with, and used, heavy weapons like .50 caliber machine guns. See KERNER COMMISSION, *supra* note 106, at 55, 57, 278.

108. See Seigle, *supra* note 3 (describing the bullet-resistant armor worn by soldiers).

109. See Greg Seigle, *Army Called to Quell Rioting in L.A.*, ARMY TIMES, May 11, 1992, at 6.

Soldiers train as they fight, with the expectation that they will fight as they have trained.¹¹⁰ In Los Angeles in 1992, the military viewed the threat as armed, organized gangs.¹¹¹ When deployed, the military forces, which included Army, Marine Corps and federalized California National Guard troops,¹¹² began setting up roadblocks and conducting aggressive patrolling.¹¹³ The approach to this civil disturbance was the same as if it were a wartime theater of operations, and one Army officer even characterized it as a MOUT—a Military Operation on Urban Terrain—the Army's term for urban warfare.¹¹⁴

Though carried out by civilian peace officers, the events surrounding the case of *Burton v. Waller*¹¹⁵ serve to illustrate a typical "military-type response" to a civilian disorder situation. In that case, a large group of Mississippi Highway Patrolmen and officers of the local police department confronted a group of students on the predominantly African-American Jackson State College campus on May 15, 1970, less than two weeks after the tragic events at Kent State.¹¹⁶ The police officers at the campus were armed with a variety of rifles and automatic weapons.¹¹⁷ They had been subjected to verbal abuse as well as volleys of bricks and bottles, some of which had hit the officers.¹¹⁸ The crowd was beginning to disperse when the police saw muzzle flashes in the window of a dormitory.¹¹⁹

110. See U.S. ARMY, FIELD MANUAL 25-101: BATTLE FOCUSED TRAINING, 1-4 to 1-5 (Sept. 30, 1992) (detailing Army training doctrine).

111. See Seigle, *supra* note 3, at 12-13 (noting that gang members were "looking for trouble" and threatening soldiers).

112. The dual nature of the National Guard—having both state and federal responsibilities—should not mislead the observer. National Guard troops are trained soldiers, and over 300,000 reservists, including National Guard troops, served in Operation Desert Shield/Desert Storm from 1990 through 1991. BOB WOODWARD, THE COMMANDERS 283-84 (1991). Stung by the failure to achieve victory in Vietnam, the military purposely placed certain critical units in the reserve components. *Id.* at 284. The purpose of this restructuring was to ensure that a President would be unable to conduct a major military action without calling the citizen-soldiers of the National Guard and Reserves to active duty, thereby "making it difficult or impossible to slide slowly into war without the public's participation." *Id.*

113. See Seigle, *supra* note 3.

114. See *id.* at 16.

115. 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975).

116. See CAMPUS UNREST, *supra* note 40, at 287-90. Members of the Mississippi National Guard mobilized to deal with the disorder at the Jackson State campus as well, but they deployed only on the perimeter of the campus and were not involved in the events that led to the deaths and injuries. *Burton*, 502 F.2d at 1269, 1272. For a discussion of the Kent State incident, see *infra* notes 132-40 and accompanying text.

117. *Burton*, 502 F.2d at 1269.

118. *Id.* at 1268-69.

119. *Id.* at 1270.

The police opened fire.¹²⁰ The military term for this technique is "suppressive fire," directing so much firepower toward the enemy that a sniper is unable to continue shooting.¹²¹ In less than thirty seconds the peace officers "discharged between 121 and 153 rounds of ammunition containing between them 793 and 1001 separate projectiles."¹²² Two students were killed and a number of others were injured.¹²³ Ironically, the window pane where the sniper was located was untouched by the bullets.¹²⁴ While the Mississippi officers were unusually heavily armed,¹²⁵ their weaponry was light compared to that carried by the typical soldier.¹²⁶

The use of heavily armed soldiers to protect African-American students enrolling in Southern schools occurred without the loss of life during the late-1950s and early-1960s.¹²⁷ However, other uses of the military were considerably bloodier. During the 1960s, troops killed a number of persons while restoring order during riots in Los Angeles's Watts area,¹²⁸ Detroit¹²⁹ and Newark.¹³⁰ However, the most horrific incident took place at Kent State University.¹³¹

On May 1, 1970, a mob of students and nonstudents began a protest that rapidly turned violent.¹³² Protestors and others looted stores in

120. *Id.*

121. See FIELD MANUAL 23-9, *supra* note 106, at 4-1 (explaining suppressive fire techniques); see also FIELD MANUAL 7-10, *supra* note 32, at 4-29 (describing use of suppressive fire during attack).

122. *Burton*, 502 F.2d at 1270.

123. *Id.* at 1271.

124. *Id.*

125. *Id.* at 1269.

126. See *id.* at 1269 (discussing weapons carried by Mississippi police at Jackson State); FIELD MANUAL 23-9, *supra* note 106, at 2-2 (discussing standard military weaponry). Ironically, the Mississippi National Guardsmen at Jackson State that day were specially equipped for civil disturbance duty. *Burton*, 502 F.2d at 1272. Their commanding general testified at the trial that most men carried shotguns loaded with birdshot. *Id.* The Guardsmen had also instituted other special procedures to minimize injuries. *Id.*

127. See Exec. Order No. 11,118, 28 Fed. Reg. 9863 (1963) (ordering military to enforce school desegregation orders in Alabama); Exec. Order No. 11,111, 28 Fed. Reg. 5709 (1963) (ordering military to "suppress unlawful assemblies, combinations, conspiracies and domestic violence" in Alabama); Exec. Order No. 11,053, 27 Fed. Reg. 9681 (1962) (ordering military to enforce court desegregation orders in Mississippi); Exec. Order No. 10,730, 22 Fed. Reg. 7628 (1957) (ordering military to enforce school desegregation orders in Arkansas).

128. See KERNER COMMISSION, *supra* note 106, at 20.

129. See *id.* at 53-59.

130. See *id.* at 36-38.

131. See generally CAMPUS UNREST, *supra* note 40, at 233-410 (describing circumstances surrounding Kent State shootings).

132. *Id.* at 240-43.

town,¹³³ and burned the campus Reserve Officer Training Corps (ROTC) building.¹³⁴ Ohio Governor Rhodes, in response to a plea by the Mayor of Kent, mobilized forces of the Ohio Army National Guard to restore order to the town and campus.¹³⁵

The troops, combat soldiers from infantry and cavalry units, deployed on the campus.¹³⁶ One faculty member later described the Guardsmen as "summertime soldiers. They're not professionals. They're scared kids."¹³⁷ The mob of students approached, hurling rocks and shouting obscenities.¹³⁸ The troops opened fire for reasons that remain unclear, and when the shooting ended four young Americans lay dead.¹³⁹ In the aftermath of the shootings, the courts were faced with questions of judicial oversight of executive military action¹⁴⁰ and questions of civil liability.¹⁴¹ Even today, as the domestic role of the military expands, these important questions remain unanswered.¹⁴²

B. *The Organization of Military Forces in Civilian Support Missions*

The command structure in a civilian support mission creates the potential for misuse of military forces. When the military engages in combat, it is critical that the chain of command be clearly defined from the lowest foot soldier to the President, the Commander in Chief of the Armed Forces of the United States.¹⁴³ Yet when the military engages in civilian support missions the chain of command becomes much more complex, making it virtually impossible to conduct coherent and synchronized operations.¹⁴⁴ Often, the military is suddenly subordinated to civilian officials and agencies that may lack a meaningful understanding of the appropriate and inappropriate uses of military forces.

133. *Id.* at 241.

134. *Id.* at 248.

135. *Id.* at 250.

136. *Id.* at 269-70.

137. *Id.* at 278.

138. *Id.* at 272-73.

139. *Id.* at 273-74. In addition, nine others were seriously injured by National Guard gunfire. *Id.*

140. See *infra* part IV.B.

141. See *infra* part IV.

142. See *supra* notes 14-24 and accompanying text.

143. See WOODWARD, *supra* note 112, at 175-76; see also U.S. CONST. art. II, § 2, cl. 1 (making President Commander in Chief).

144. See, e.g., Healy & Stolberg, *supra* note 16. When the chain of command becomes confused or subject to interference, military efficiency can suffer dramatically. See WOODWARD, *supra* note 112, at 175-76. Needless interference in tactical operations by civilian leaders during the S.S. Mayaguez crisis had been counterproductive, as it was later during the ill-fated Beirut peacekeeping mission and the Grenada invasion. *Id.*

This problem is especially pronounced when governors call National Guard forces to state, as opposed to federal, active duty. A state governor may call forth the National Guard within the state and commit it to civilian support missions without consulting the federal military chain of command.¹⁴⁵ As such, the governor is commander in chief of those Guard units and may place them under the operational control of any civilian organization he or she desires.

The federalized military avoids a similar situation by attempting to remain under the usual military chain of command during civilian support missions.¹⁴⁶ This is not always possible to the extent that the military might wish. As in the Los Angeles riots, the military must closely coordinate with local law enforcement agencies, even to the point of taking mission assignments from the civilian Emergency Operations Center.¹⁴⁷

The military forces involved in the Los Angeles riot operation carried out tasks selected by civilians.¹⁴⁸ The civilian authorities, though advised by military representatives assigned as liaisons, made the decisions as to what missions were appropriate for the military forces.¹⁴⁹ In Los Angeles, authorities ruled the killing of Marvin Rivas by soldiers justified.¹⁵⁰ Such was not the case at Kent State, where Ohio Governor Rhodes, in response to a plea from the Mayor of Kent and the President of the University, assigned the Ohio National Guard to restore order to the university campus, a task that in retrospect was not suitable for armed soldiers.¹⁵¹ The Governor, the Mayor and civilian officials were

145. See U.S. CONST. art. I, § 8, cl. 16. This is what took place on April 29, 1992, the first night of the Los Angeles riots. See Seigle, *supra* note 109, at 6. The California Army National Guard was not federalized (put under federal control) until May 1, 1992. See WEBSTER REPORT, *supra* note 64, at 152-53; Seigle, *supra* note 3, at 12; see also CAL. MIL. & VET. CODE § 143 (Deering 1985) (describing chain of command for nonfederalized National Guard forces placed under civilian control).

146. See Employment of Troops in Aid of Civilian Authorities: Command Authority, 32 C.F.R. § 501.3 (1992).

147. After many hours of delay, the California Army National Guard units responding to the riots were directed to accept tasks from the Los Angeles County Sheriff's Department's Emergency Operations Center. See WEBSTER REPORT, *supra* note 64, at 152; see also CAL. MIL. & VET. CODE § 365 (Deering 1985) (describing civilian chain of command for National Guard troops). Upon federalization, the units of the California Army National Guard were incorporated into the active military chain of command. See WEBSTER REPORT, *supra* note 64, at 153. The FBI was the lead agency for coordinating the federal efforts, including that of the military forces. *Id.*

148. See WEBSTER REPORT, *supra* note 64, at 153. The military forces, however, did refuse some missions the civilian command structure assigned them. *Id.* at 153-54.

149. *Id.*

150. See *supra* note 2 and accompanying text.

151. See CAMPUS UNREST, *supra* note 40, at 287-90.

unable to accurately assess the troops' training, capabilities and appropriateness. The result was tragic. As the students surged toward the heavily armed Guardsmen, the soldiers—feeling threatened and confused—fired their weapons into the crowd.¹⁵² The Kent State killings stand as a dramatic example of why military forces are inappropriate for such civilian support missions.

C. Rules Governing Use of Deadly Force

Justly placing criminal or civil liability for wrongful death is difficult, both legally and practically, because of the poor fit between military realities and the expectations of civilian law. A soldier is often expected to act in ways that are entirely contrary to the conventions of civilian law. No issue better illustrates the dichotomy than that of the use of deadly force.

1. Deadly force standard for civilians

In general, civilians who are not peace officers have a right to use deadly force only to protect themselves or others from death or great bodily harm.¹⁵³ Civilians must have an actual fear that such harm is imminent,¹⁵⁴ with some commentators stating that fear must be objectively reasonable.¹⁵⁵

Peace officers are similarly restricted in their use of deadly force, except in certain special situations.¹⁵⁶ Prior to *Tennessee v. Garner*,¹⁵⁷ peace officers were able to use deadly force against unarmed fleeing felons.¹⁵⁸ By holding that the use of deadly force to apprehend felons who pose no danger to others constituted an "unreasonable" seizure under the Fourth Amendment,¹⁵⁹ the Supreme Court limited police discretion. Today, police may use deadly force against those who reason-

152. *See id.*

153. *See* John Q. La Fond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237, 237 & n.1 (1983).

154. *See generally* WAYNE R. LA FAVE & AUSTIN SCOTT, JR., HANDBOOK ON CRIMINAL LAW 394 (1972) (describing requirement that danger posed by aggressor must be imminent), *cited in* La Fond, *supra* note 153, at 247 n.42.

155. *See, e.g.*, MODEL PENAL CODE § 3.04(1) (1985) (requiring reasonable belief that force used was "immediately necessary").

156. There is a common-law rule that deadly force may be used to quell riots. *See infra* note 160 and accompanying text.

157. 471 U.S. 1 (1985).

158. *Id.* at 4-5.

159. U.S. CONST. amend. IV.

ably appear to constitute a threat to others, whether the threat is to the peace officers involved or to the populace at large.¹⁶⁰

2. Military use of force in combat

The standard for use of force by the military not only permits the use of deadly force against enemy combatants,¹⁶¹ but requires deadly force if the killing is pursuant to a lawful order.¹⁶² In wartime, the function of the military is to kill the enemy.¹⁶³ The Federal Tort Claims Act specifically exempts from its provisions liability for military forces engaged in combat.¹⁶⁴ While the killing of enemy combatants during wartime is considered justified, the military does prosecute personnel accused of killing either civilian noncombatants¹⁶⁵ or captured enemy combatants.¹⁶⁶ This gives soldiers broad authority to use deadly force. For example, following the Persian Gulf War, which lasted only six weeks, estimates of the numbers of Iraqis killed ran as high as 100,000.¹⁶⁷

160. *Garner*, 471 U.S. at 11-12. However, the common law of torts recognizes a civil immunity privilege "for the purpose of suppressing a riot or preventing the other [person] from participating in it . . . if the riot is one which threatens death or serious bodily harm." RESTATEMENT (SECOND) OF TORTS § 142(2) (1965); see also *Smith v. United States*, 330 F. Supp. 867, 870 (E.D. Mich. 1971) (citing RESTATEMENT (SECOND) OF TORTS § 142(2) (1965) and holding that shooting of plaintiff by National Guardsmen could not be maintained under exception to Federal Tort Claims Act). Like the privilege of self defense, this special privilege requires a reasoned assessment of an imminent danger by the user of deadly force. *Burton v. Waller*, 502 F.2d 1261, 1276 (5th Cir. 1974), cert. denied, 420 U.S. 964 (1975). In *Burton*, the standard for determining what is and what is not a "riot" was low. See *id.*; see also *supra* notes 115-26 (discussing facts of *Burton*). The fact that most of the mob was retreating did not end the riotous state. *Id.* at 1277. A jury need find only that a riot existed and that the officer felt the affray threatened death or serious bodily injury to himself or others to find the homicide justified. *Id.* at 1275-76.

161. See FIELD MANUAL 7-10, *supra* note 32, at 1-1.

162. Failure to Obey Order or Regulation, 10 U.S.C. § 892 (1988) (U.C.M.J. art. 92).

163. See FIELD MANUAL 7-10, *supra* note 32, at 1-1.

164. 28 U.S.C. § 2680(j) (1988).

165. See *United States v. Calley*, 22 C.M.A. 534, 537-40, 48 C.M.R. 19, 22-25 (1973) (describing My Lai massacre committed by American troops in Vietnam in 1968), *aff'd sub nom.* *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

166. See *Soldier Acquitted in Panama Slaying*, AP, Sept. 1, 1990, available in LEXIS, Nexis Library, AP File (describing Army sergeant's acquittal on charge of shooting Panamanian prisoner).

167. See Melissa Healy & John M. Broder, *Number of Iraqis Killed May Never Be Known*, L.A. TIMES, Mar. 8, 1991, at A7. While American forces did not compile official totals, estimates of Iraq's dead during the Gulf War run from 30,000 to 100,000. *Id.* United States military forces killed an estimated 444,000 enemy soldiers and guerrillas in Vietnam. *Id.* In Grenada, 45 Grenadian soldiers were killed. *Id.* In Panama, 50 enemy soldiers were killed. *Id.*

3. The use of deadly force by military forces in civilian support operations

While the liberal use of deadly force has been permitted in martial law situations,¹⁶⁸ troops in peacetime usually have no greater authority to employ deadly force than civilian peace officers.¹⁶⁹ For example, in *Manley v. State*¹⁷⁰ a Texas National Guardsman was assigned to prevent anyone from crossing a barricaded road during a visit to Dallas by President Taft.¹⁷¹ When a civilian attempted to pass through the prohibited area to catch a streetcar, Private Manley fatally wounded him with a bayonet.¹⁷² The court found:

[H]e must be judged as any other officer, and, if it did not at the time reasonably appear that he was in danger of losing his life or suffering some serious bodily injury, he would not have the right to take human life, and, if he does so under such circumstances, he must pay the penalty of the law.¹⁷³

On its face, the rule appears clear, but circumstances unique to the military's role make the boundaries of the rule uncertain.¹⁷⁴ A soldier is not the same as "any other officer."¹⁷⁵ He or she is equipped differently, trained differently and operates within a system totally unlike that of civilian law enforcement officers.¹⁷⁶ The application of civilian standards to military personnel operating domestically creates a host of problems.¹⁷⁷

4. Problems in applying use of force rules to military civilian support missions

a. situational considerations

The chaotic and dangerous circumstances under which troops operate in civilian support missions make it difficult to determine legal reasonability. Federal troops rarely participate in "normal" law enforcement operations because federal law¹⁷⁸ limits their internal use to

168. See *Commonwealth ex rel. Wadsworth v. Shortall*, 55 A. 952, 957-58 (Pa. 1903) (holding soldier guiltless for killing that occurred during martial rule).

169. See *Manley v. State*, 137 S.W. 1137, 1141 (Tex. Crim. App. 1911).

170. 137 S.W. 1137 (Tex. Crim. App. 1911).

171. *Id.* at 1138.

172. *Id.* at 1140.

173. *Id.* at 1141.

174. See *infra* part III.C.4.

175. *Manley*, 137 S.W. at 1141.

176. See *supra* part II.C.4.

177. See *supra* part II.C.4.

178. See Posse Comitatus Act, 18 U.S.C. § 1385.

emergencies as determined by the President.¹⁷⁹ National Guard soldiers, like Private Manley, on the other hand, sometimes operate in normal law enforcement situations, because, unless federalized by the President of the United States,¹⁸⁰ they are at the disposal of the state governor and sometimes assist in such routine law enforcement operations as searches for fugitives or providing security.¹⁸¹

The military most frequently is called out after the situation has deteriorated to a point at which only drastic action can restore order.¹⁸² Soldiers usually assist civilian law enforcement in dangerous, volatile situations.¹⁸³ Such situations make the use of deadly force much more likely, not only because of the dangers the troops are likely to encounter, but because the civilian command structure may not have the expertise to limit military participation to appropriate situations.¹⁸⁴

Another consideration is that in volatile situations, the soldiers may feel personally threatened. As in the Kent State incident,¹⁸⁵ that threat may seem unreasonable to the casual observer. Still, murder prosecutions like that of Private Manley¹⁸⁶ are uncommon, perhaps because prosecutors may be reluctant to prosecute law enforcement personnel for abusive use of deadly force.¹⁸⁷ There may also be a great deal of sympathy among the police who actually investigate the homicide.¹⁸⁸ These institutional factors could effectively insulate guilty troops from justice, even though their actions were demonstrably culpable.

179. 10 U.S.C. §§ 331-333.

180. *Id.*

181. *See, e.g., National Guard Patrols Florida Highway Hit by Sniper Attacks*, L.A. TIMES, Nov. 7, 1992, at A13 (stating that Florida Army National Guard troops were ordered to patrol dangerous stretch of freeway).

182. *See supra* part II.C.4.

183. The situations that call for military intervention often involve a high proportion of criminals among the civilians. *See Fine, supra* note 38, at 1723-24. For example, in the Detroit riot of 1967, 48.6% of those arrested for riot-related offenses had criminal records. *Id.* In the Newark riots of 1967, 45% had criminal records. *Id.* In the Watts riot of 1965, 73% of those arrested had criminal records. *Id.*

184. *See supra* part III.B.

185. *See generally* CAMPUS UNREST, *supra* note 40, at 233-410 (describing circumstances of Kent State incident).

186. *Manley v. State*, 137 S.W. 1137 (Tex. Crim. App. 1911).

187. Gerald F. Uelman, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L.A. L. REV. 1, 63 (1973) (noting lack of enthusiasm for prosecution in police homicide cases).

188. *Id.* at 38, 41 (noting that police officers expect support for actions and are reluctant to investigate police shootings).

b. military training and equipment

Soldiers are not normally trained to make legal distinctions when conducting dangerous operations, and, unlike peace officers, soldiers are usually taught civilian rules governing the use of deadly force only when on the verge of beginning a civilian support mission.¹⁸⁹ Commanders provide their soldiers with "rules of engagement,"¹⁹⁰ but, especially in tense situations, there is great potential to misinterpret "reasonability." Private Manley made one such misinterpretation, which resulted in the unnecessary death of a civilian.¹⁹¹ The Ohio Guardsmen at Kent State made the same mistake.¹⁹² Five lives were lost between these two incidents because military forces acted in what were, in retrospect, clearly unreasonable manners.¹⁹³

Because of the weapons the military uses, determining which individual soldier is responsible for an unlawful military homicide is another practical problem. This is especially difficult in a mass fire situation like the one that occurred at Jackson State.¹⁹⁴ Soldiers generally carry automatic weapons, though in some cases they are modified to allow only semi-automatic fire.¹⁹⁵ Still, in less than a minute, a squad of eleven infantrymen with M16A1 assault rifles could fire 660 rounds.¹⁹⁶ The sheer number of projectiles makes it difficult to determine which soldier shot what victim. In addition, the visual identification of a particular soldier is made especially difficult by the uniforms and equipment of the soldiers. For example, troops wear protective ("gas") masks when using tear gas, which completely obscures the soldiers' faces.¹⁹⁷

189. See, e.g., Seigle, *supra* note 3 (noting that soldiers deployed in Los Angeles received rules of engagement to guide use of deadly force).

190. See *id.*

191. Manley v. State, 137 S.W. 1137, 1140 (Tex. Crim. App. 1911).

192. See CAMPUS UNREST, *supra* note 40, at 273-74.

193. See *id.*

194. Burton v. Waller, 502 F.2d 1261, 1271 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975). "Investigators could not trace the path of any of the projectiles to determine which specific person fired them. Nor were shotgun pellets recovered from those wounded or killed traceable to specific weapons . . ." *Id.*

195. See Seigle, *supra* note 3, at 15.

196. This assumes each soldier fires two complete 30-round magazines. Troops are trained in high-volume fire techniques. See FIELD MANUAL 23-9, *supra* note 106, at 4-1 to -14.

197. See, e.g., CAMPUS UNREST, *supra* note 40, at 305-409 (depicting National Guardsmen in protective masks at Kent State).

c. *military orders and deadly force*

Federal law requires a soldier to obey the lawful orders of his or her superiors.¹⁹⁸ However, deciding that an order is “unlawful” can be hazardous because a soldier risks punishment if the order turns out to be lawful.¹⁹⁹ Although in *Manley v. State*²⁰⁰ the court listed Private Manley’s possible alternatives to deadly force, in his mind the soldier could have felt confused and trapped in a no-win situation. Private Manley could have chosen not to stop the intruder, and thus disobey his commander, or he could have used what means he had at hand—a bayonet—to stop the trespasser. Manley made his choice, and as a result was charged with murder.²⁰¹

At times, military personnel find their equipment and training prevent them from complying with their orders.²⁰² Because of their unique weaponry²⁰³ and training,²⁰⁴ military forces have a greater potential to cause casualties than normally equipped police forces.²⁰⁵ For example, although military rules of engagement in a civilian support operation may order troops to “shoot to wound,”²⁰⁶ the troops are trained to aim for vital areas of the body and require retraining to conform with the new guidance.²⁰⁷ Putting forces trained and equipped to kill in a situation in which force can be used only as a last resort invites disaster.

d. *liability within the command structure*

Determining which parties within the command structure are liable for unlawful uses of force is another problem. Although soldiers operate under orders, they are not protected from criminal liability for carrying

198. See Failure to Obey Order or Regulation, 10 U.S.C. § 892 (1988) (U.C.M.J. art. 92); see also *Commonwealth ex rel. Wadsworth v. Shortall*, 55 A. 952, 957-56 (Pa. 1903) (holding that soldier is bound to obey orders of officers unless orders are facially illegal).

199. *Manley v. State*, 137 S.W. 1137, 1141 (Tex. Crim. App. 1911).

200. 137 S.W. 1137 (Tex. Crim. App. 1911).

201. *Id.* at 1138.

202. See discussion *supra* part III.B.4.b.

203. See discussion *supra* part III.C.4.b.

204. See Seigle, *supra* note 33, at 16 (contrasting skills taught in regular military training with skills required in civil disturbance operations).

205. Police are equipped with military-style weaponry only in exceptional circumstances. See discussion *supra* part III.A.; cf. *Burton v. Waller*, 502 F.2d 1261, 1269 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975) (describing instance in which police officers were armed similarly to soldiers).

206. See Seigle, *supra* note 33 (discussing standard wartime procedure of shooting to kill); see also *Burton*, 502 F.2d at 1273 (detailing orders given Mississippi National Guardsmen ordering them to fire at legs of rioters instead of their heads).

207. See Seigle, *supra* note 33.

out an illegal order, nor is the officer who gives that order.²⁰⁸ Yet, there are many layers of officers between a governor or President and the soldiers. Though an officer is responsible for the acts of those he or she commands, it is difficult to determine how far up the hierarchy criminal or civil liability should extend.²⁰⁹

In situations involving a reckless or even an "abandoned and malignant"²¹⁰ killing, to whom liability extends is unclear. For example, assume an officer, who knows innocents in the area will likely be killed, orders his or her soldiers to fire into a crowd to kill what he or she thinks to be a sniper. While the soldiers are unquestionably able to use deadly force to defend themselves from the sniper, the method chosen by the officer might be so out of proportion to the threat as to expose the troops to possible liability. However, states may attempt to protect soldiers from personal liability for acts performed in the line of duty.²¹¹

Another issue regarding liability is determining where liability ends. Liability could theoretically rise until it reached the commander in chief. Except in the case of a clear order to kill without justification, culpability grows more and more abstract as one reaches higher in the ranks for liability.²¹²

208. See 10 U.S.C. § 892 (U.C.M.J. art. 92); see also *Commonwealth ex rel. Wadsworth v. Shortall*, 55 A. 952, 956-57 (Pa. 1903) (noting that soldier is bound to obey orders of officers unless orders are facially illegal).

209. See *United States v. Calley*, 46 C.M.R. 1131, 1178 (1973) (Army officer charged in killings committed by soldiers under his command). There are situations in which some form of liability might extend to a commanding officer for the actions of his or her troops. For instance, if a lieutenant who ordered his or her soldier to shoot a nonthreatening person for violating the curfew, such an unjustified shooting would be murder. See 1 WILLIAM BLACKSTONE, COMMENTARIES *400.

210. See, e.g., CAL. PENAL CODE § 188 (Deering 1985).

211. See, e.g., CAL. MIL. & VET. CODE § 366 (Deering 1985) ("[T]he commanding officer shall use his discretion with respect to the propriety of attacking or firing on any mob . . . His honest and reasonable judgment in the exercise of his duty shall be full protection, civilly and criminally, for any act or acts done while on duty."); *id.* § 392 (Deering 1985) ("Members of the militia in the active service of the State shall not be liable civilly or criminally for any act or acts done by them in the performance of their duty."); *id.* § 393 (Deering Supp. 1992) (indemnifying soldiers for acts done by them while on duty). Note that these regulations, on their faces, protect only service members on state duty. *Id.* The troops in Los Angeles were initially on state duty. See WEBSTER REPORT, *supra* note 64, at 152 app. 14. However, they were soon federalized. *Id.* The immunity rules for federal officials are more complicated. See *supra* part IV.C.

Of course, troops on state active duty are still subject to federal civil rights legislation. See 42 U.S.C. § 1983 (1988). The Kent State plaintiffs brought suit against soldiers of the Ohio National Guard under that statute. *Krause v. Rhodes*, 471 F.2d 430, 433 (6th Cir. 1972), *rev'd sub nom. Scheuer v. Rhodes*, 416 U.S. 232 (1974). For a discussion of federal civil rights claims, see *supra* note 35.

212. For example, it is difficult for a lieutenant colonel who commands a hypothetical infantry battalion of 800 soldiers in six separate companies to know the quirks, foibles and abili-

Theoretically, culpability could extend beyond the military ranks. Civilian officials customarily control the military in civilian operations.²¹³ Eventually, however, culpability fades as it passes through higher and higher echelons.²¹⁴ For example, whereas Lieutenant Calley, the Army officer whose platoon murdered well over 100 Vietnamese in the infamous My Lai Massacre, was convicted of murder, the division commander, four levels of command above Lieutenant Calley, was not likewise court-martialed.²¹⁵ Moreover, no civilian officials responsible for American policy in Vietnam were charged, though the acts of the civilians who made policy placed American troops in a situation where the crime was likely to occur.²¹⁶

Thus, civilian leaders can place troops in situations in which troops might unlawfully use deadly force. However, whether the use of deadly force is due to inappropriate training, a limitation of the soldiers' equipment, a misunderstanding of the law, or unwise or even illegal orders from above, the soldiers alone will pay the price if a suit follows.²¹⁷

Still, when a soldier must make a decision whether to act, he or she cannot know how a court might view his or her decision months or years later.²¹⁸ Shielded from liability, the military leadership and the civilians that control it are able to use the military without accepting the corresponding responsibility.

ties of every one of his or her individual soldiers. Liability, if extended that far, might turn on such issues as the level of training proficiency the unit has achieved. For example, the lieutenant colonel could not reasonably be held liable for the deployment of an unstable soldier, but culpability for negligence might attach if the lieutenant colonel deployed his or her troops knowing they were untrained in the proper use of deadly force.

213. See 9 Op. Att'y Gen. 517 (1860). Since before the Civil War the military has remained strictly under civilian control when conducting civilian law enforcement-type missions. Cf. CAL. MIL. & VET. CODE § 365 (Deering 1985) (describing state military forces' chain of command civilian control with tactical control in actual execution of military operations left to military command structure). But see Rick Maze, *Pentagon May Get Disaster-Relief Role Back*, ARMY TIMES, Sept. 21, 1992 at 26 (discussing move in Congress to have Pentagon take over certain duties of Federal Emergency Management Agency after its lackluster performance in wake of Hurricane Andrew).

214. See *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973), *aff'd sub nom. Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

215. *Id.* at 534, 48 C.M.R. at 19.

216. For a concise discussion of how high-level military and civilian officials escaped sharing blame for the massacre of civilians at My Lai, see Ron Ridenhour, *'It Was a Nazi Kind of Thing'*, L.A. TIMES, Mar. 16, 1993, at B7.

217. Some states have acted to protect soldiers from personal liability. See *supra* note 211.

218. See discussion *infra* part IV.C.

IV. GOVERNMENTAL, POLITICAL AND MILITARY IMMUNITY ISSUES

A party claiming to be injured, or in danger of being injured, due to a military civilian support mission, may well find him or herself unable to obtain relief, whether in the form of damages or an injunction. This is the result of various civil immunities held by the government, government officials and personnel engaged in civilian support operations. Such immunities are necessary to allow the government to perform its most basic functions. However, the price paid is that injured parties are denied relief. This effect is even more pronounced when the military becomes involved.

In the Federal Tort Claims Act, the federal government has waived its sovereign immunity in some, but not all, cases.²¹⁹ In addition, both the executive²²⁰ and the military personnel²²¹ he or she commands are often, though not always, protected from civil liability for actions taken during civilian support missions.²²² The courts have attempted to balance the commander in chief's prerogatives and military necessity with the basic protections and remedies for civilians, with a tendency toward favoring the executive and the military.²²³

Civilian support operations are inherently dangerous because they rely on military forces to perform tasks for which they are not suited.²²⁴ Moreover, the civilian organizational structure under which the military must function may not have the expertise to appropriately employ military forces.²²⁵ The result is that civilian society is exposed to the relatively high risks that come with the use of the military²²⁶ while being denied the legal recourses normally available to an injured party, such as injunctions and damages because of the need to protect the freedom of the executive and the military in carrying out their duties.²²⁷

A. Federal Government Liability

A suit for damages against the U.S. government is attractive to a plaintiff for two reasons. First, military personnel are often immune from civil suits for actions taken during the course of their duties.²²⁸ Sec-

219. 28 U.S.C. § 1346(b) (1988).

220. See *infra* part IV.B.

221. See *infra* part IV.C.

222. See *infra* part IV.B-C.

223. See *infra* part IV.B-C.

224. See discussion *supra* part III.C.4.d.

225. See discussion *supra* part III.B.

226. See discussion *supra* part III.

227. See discussion *infra* part IV.B-C.

228. See discussion *infra* part IV.C.2.

ond, even if immunity is not applicable, military personnel generally have only limited funds with which to pay judgments.²²⁹ As a result, the only way for a plaintiff to recover damages is to sue the federal government.

The Federal Tort Claims Act²³⁰ specifically defines government employees as including "members of the military or naval forces of the United States, [and] members of the National Guard while engaged in training or duty" under Title 32.²³¹ Soldiers "acting in the line of duty" are considered to be "acting within the scope of [their] office or employment,"²³² and thus the United States becomes liable for their actions.

In *Cerri v. United States*,²³³ a soldier on guard duty on a public wharf in San Francisco tried to shoot a fleeing civilian misdemeanant.²³⁴ He missed, striking and severely injuring a civilian bystander.²³⁵ The court found that the soldier's use of greater force than required, or even allowed, did not bring him outside of the scope of his duties, and therefore, the United States government was liable.²³⁶

In civilian support missions circumstances can become more complex. For example, a situation might arise in which the soldier's use of deadly force is not negligent, but the decision to deploy the troops into the area is. Though troops are cautioned to avoid casualties among innocents, soldiers may potentially use justifiable deadly force to kill non-combatants. Without a claim of negligence against the soldiers for using their weapons, the victim has no remedy available from the federal government because the civilian officials ultimately responsible for the deployment are generally immune from liability.²³⁷

If the soldier who pulled the trigger is not negligent, either because the soldier's use of deadly force was justified or because he or she was acting in good faith adherence to lawful orders, then the only other theory on which to seek recovery would be a negligent deployment theory, as was used against the officials of the State of Ohio after Kent State.²³⁸ Yet, the Federal Tort Claims Act specifically exempts military deci-

229. See *Martinez v. Schrock*, 537 F.2d 765, 769 (3d Cir. 1976), *cert. denied*, 430 U.S. 920 (1977).

230. 28 U.S.C. §§ 2671-2680 (1988).

231. 32 U.S.C. §§ 316, 502-505 (1988).

232. 28 U.S.C. § 2671.

233. 80 F. Supp. 831 (N.D. Cal. 1948).

234. *Id.* at 832.

235. *Id.*

236. *Id.* at 835.

237. See *infra* part IV.B.

238. See *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom. Scheuer v. Rhodes*, 416 U.S. 232 (1974).

sions.²³⁹ Actions by the military in wartime are also specifically exempted from the waiver of sovereign immunity granted by the Federal Tort Claims Act,²⁴⁰ which indicates that Congress had some recognition of the type of rapid, critical and perhaps not fully examined decisions that are made by soldiers under fire.

In short, victims of an improper use of force may sometimes recover from the federal government. A large loophole remains, however, when the use of force does not constitute negligence but still injures an innocent party.

B. Assessing Liability upon the Political Leadership

1. Responsibility of state officials

In some cases, courts have allowed plaintiffs to sue state officials for injuries caused by military use of force. For instance, in *Krause v. Rhodes*,²⁴¹ one of the cases emerging from the Kent State incident, the plaintiffs appealed the dismissal of a claim to recover damages from the "Governor of Ohio, the Adjutant General and Assistant Adjutant General of the Ohio National Guard, various officers and enlisted men of the National Guard and the President of the University"²⁴² under 42 U.S.C. § 1983²⁴³ and under Ohio's wrongful death statutes.²⁴⁴ The plaintiffs, representatives of those killed, alleged

that the defendants conspired to call out the National Guard and were guilty of wanton, wilful and negligent conduct when they knew or should have known that there was no cause or insufficient cause therefor; that the troops were not properly trained in the correct and reasonable use of weapons to suppress civil disorders; and that the troops were permitted to be armed with loaded weapons.²⁴⁵

Plaintiffs filed a similar suit in Ohio's courts,²⁴⁶ but the Ohio Supreme Court eventually dismissed the case on grounds of sovereign immunity because the Assembly had not made the state subject to suit by waiving its sovereign immunity.²⁴⁷ In *Krause*, the court refused to rein-

239. 28 U.S.C. § 2680(a).

240. *Id.* § 2680(j).

241. 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom.* Scheuer v. Rhodes, 416 U.S. 232 (1974).

242. *Id.* at 430.

243. Civil Rights Act, 42 U.S.C. § 1983.

244. *Krause*, 471 F.2d at 433.

245. *Id.*

246. *See Krause v. State*, 285 N.E.2d 736 (Ohio 1972).

247. *Id.* at 745.

state the federal suit.²⁴⁸ The court reasoned that the officials involved were immune from liability because of the positions they held within the state government.²⁴⁹ The court also held that the Eleventh Amendment²⁵⁰ barred such a suit against the State of Ohio because the defendants were acting in the "interests of the State in the performance of its highest function, namely, the suppression of riots or insurrection and the protection of the public."²⁵¹

The Supreme Court disagreed and reversed the dismissal.²⁵² It ordered the trial court on remand to consider

whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and the enlisted personnel of the Guard acted in good-faith obedience to the orders of their superiors.²⁵³

The Supreme Court's decision strengthened the judiciary's ability to scrutinize state executives when plaintiffs make allegations that their civil rights were deprived under 42 U.S.C. § 1983. In *Moyer v. Peabody*²⁵⁴ the Supreme Court created a "good faith" test to judge the actions of state officials who take drastic steps to deal with civil disorder. Like the Kent State cases, *Moyer* was an action under section 1983, this time seeking damages from former state officials, including the ex-Governor, for the plaintiff's imprisonment by military forces.²⁵⁵ Justice Holmes, upholding the dismissal of the complaint, wrote that a governor may

make the ordinary use of the soldiers[,] . . . may kill persons who resist, and, of course, . . . may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to

248. *Krause*, 471 F.2d at 433.

249. *Id.* at 438-39.

250. U.S. CONST. amend. XI.

251. *Krause*, 471 F.2d at 433-38.

252. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

253. *Id.* at 250.

254. 212 U.S. 78 (1909).

255. *Id.* at 82.

head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.²⁵⁶

While the Court in *Moyer* seemed to create a "good faith" standard, in practical terms plaintiffs cannot use the standard as a means to avoid official immunity because courts are usually reluctant to interfere with executives acting in accordance with what the Sixth Circuit called the "highest function" of an executive.²⁵⁷ In *Scheuer v. Rhodes*²⁵⁸ the Supreme Court chose to distance itself from the previous holding in *Sterling v. Constantin*,²⁵⁹ stating that in determining whether civil disorder requires a military response, a governor's "decision to that effect is conclusive."²⁶⁰ The Court allowed trial on the issue of whether the Governor of Ohio and his officials acted in good faith in declaring an emergency and in the actions they took to deal with the disorder.²⁶¹

Nevertheless, the Court has held the legislative branch of state governments immune from suit, granting immunity to state legislators in the earlier decision of *Tenney v. Brandhove*.²⁶² The Justices noted the importance of legislative independence in holding that the legislators were entitled to immunity.²⁶³

The Court's decision in *Scheuer* may have turned on the unusual facts of the case, for the incident at Kent State was not a typical "riot." The rioting at Kent State was related to a political movement, specifically, opposition to the Vietnam War in general and the invasion of Cambodia in particular.²⁶⁴ In Los Angeles, the disorder seemed to have less to do with a coherent political agenda than raw, unfocused rage.²⁶⁵ In that situation, the perception was that the mobs consisted of opportunistic looters and "gangbangers."²⁶⁶ Similarly, when guarding against looters in disaster-stricken areas or searching for drug smugglers, troops will

256. *Id.* at 84-85.

257. *Krause*, 471 F.2d at 433.

258. 416 U.S. 232 (1974).

259. 287 U.S. 378 (1932).

260. *Scheuer*, 416 U.S. at 250.

261. *Id.*

262. 341 U.S. 367 (1951).

263. *Id.* at 377-79.

264. See CAMPUS UNREST, *supra* note 40, at 287 (noting that disorder was sparked by U.S. invasion of Cambodia).

265. See Seigle, *supra* note 3.

266. A survey conducted by the Webster Commission in Los Angeles after the riots asked the following question: "If some victims were targeted, whom do you believe did the targeting?" Thirty-five percent of respondents named "Gangs," while 42% named "Opportunists." See WEBSTER REPORT, *supra* note 64, at app. 16 (question 30).

face persons engaging in criminal activities rather than those taking part, however inappropriately, in a political debate.

Another factor is the nature of the civilians that the military faced. At Kent State, the troops faced middle-class college students.²⁶⁷ A court may be much more willing to examine the actions of an elected official or officer when the victims are so familiar and attractive. Contrast the middle-class college students at Kent State with alleged drug dealer Marvin Rivas,²⁶⁸ and it is clear that dead students will garner much more sympathy.

The two incidents are distinct in another way as well. The popular perception is that at Kent State something went terribly wrong,²⁶⁹ while, in contrast, many considered the use of troops in Los Angeles a success.²⁷⁰ It seems that if all goes well, courts consider the deployment and use of troops reasonable, but a disaster renders the decision unreasonable. For example, in *Krause*, the plaintiffs cited the fact that the troops carried loaded weapons as one of the allegations of negligent conduct.²⁷¹ However, until the shooting began, there was no cause of action on that particular issue. The courts are reluctant to examine the operational aspects of military employment, such as how the troops are equipped, and are reluctant to act until after the damage is done.²⁷² In other words, there is no way to challenge civilian officials on the deployment of troops or on operational policy in civilian support operations without some disaster taking place, because few courts will be willing to question the judgment of civilian authorities until after circumstances demonstrate that something went wrong.

In connection with the Kent State incident, the Supreme Court considered the availability of injunctive relief to prohibit the Governor from calling out troops, as well as to monitor the soldiers' training and operations.²⁷³ Student leaders at Kent State brought their suit in *Gilligan* in an effort to place the Ohio National Guard under judicial supervision.²⁷⁴ The Supreme Court refused to sanction a judicial intrusion into the mili-

267. See *CAMPUS UNREST*, *supra* note 40, at 235 (finding that most Kent State students came from middle-class backgrounds).

268. See *Feldman*, *supra* note 2, at A25 (detailing killing of Rivas by soldiers).

269. See *CAMPUS UNREST*, *supra* note 40, at 287-90 (characterizing shootings as tragedy).

270. See *WEBSTER REPORT*, *supra* note 64, at app. 16; *Seigle*, *supra* note 3, at 15.

271. *Krause v. Rhodes*, 471 F.2d 430, 433 (6th Cir. 1972), *rev'd sub nom. Scheuer v. Rhodes*, 416 U.S. 232 (1974).

272. See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). While the U.S. Supreme Court did not state that injunctive relief for activities of the military is never appropriate, it recognized military training, orders and equipment as constituting nonjusticiable issues. *Id.*

273. *Id.* at 11-12.

274. *Id.* at 3.

tary arena, holding that the case presented nonjusticiable issues.²⁷⁵ The employment of the state military, it held, was clearly within the province of the executive.²⁷⁶ The Court found it inappropriate to intervene by using injunctive relief and judicial supervision of the training and operational aspects of the Ohio National Guard.²⁷⁷

In *Scheuer*, the Court clarified its holding in *Gilligan* by stating that the *Gilligan* Court had not held the actions of the Guard "beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief."²⁷⁸ Thus, the Supreme Court made remedies available to plaintiffs, but only in the most extreme cases, and only after the damage was done.

As a result, there are two primary, and seemingly contradictory, negative effects of *Gilligan*. First, the courts have established that in certain cases they are willing to impose judicial scrutiny on tactical military operations, notwithstanding the courts' distinctly limited expertise in the area. On the other hand, the courts may be the only institution able to check the executive use of the military; yet the courts are reluctant to act before a tragedy occurs.

2. Responsibility of federal civilian officials

a. powers of the President to use military forces

The Constitution gives Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."²⁷⁹ The Constitution designates the President

275. *Id.* Nonjusticiable political questions are those in which is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). "Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction." *Morgan v. Rhodes*, 456 F.2d 608, 619 (1972) (Celebrezze, J., dissenting), *rev'd sub nom.* *Gilligan v. Morgan*, 413 U.S. 1 (1973).

276. *Gilligan*, 413 U.S. at 10.

277. *Id.* "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process." *Id.*

278. *Scheuer*, 416 U.S. at 249 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 11-12 (1973)).

279. U.S. CONST. art. I, § 8, cl. 15.

of the United States the Commander in Chief of the United States Armed Forces and of the militia of each state.²⁸⁰ The President makes the decision to commit federal forces internally in cases of insurrection,²⁸¹ to enforce federal authority²⁸² or to suppress disturbances that interfere with state or federal law.²⁸³ Yet, the President's power to use the military is limited by Congress.²⁸⁴

The Supreme Court has recognized the President's broad authority to use the military in the international arena.²⁸⁵ However, it has often deferred to executive domestic decision making during wartime, such as in the *Prize Cases*,²⁸⁶ in which the Court acknowledged President Lincoln's power to determine what degree of military force was necessary to prevent the secession of the South in the Civil War.²⁸⁷ It held that the President had the same degree of power to confront a domestic insurrection as he or she could exercise in a conflict against a foreign enemy.²⁸⁸

A second notable decision was *Korematsu v. United States*,²⁸⁹ in which the Supreme Court upheld the military decision to exclude Americans of Japanese ancestry from the West Coast of the United States during World War II.²⁹⁰ Justice Black noted that although racially based restrictions are "immediately suspect,"²⁹¹ military necessity justified excluding Americans of Japanese descent from their homes on the West Coast of the United States.²⁹² The decision demonstrated that during wartime, the courts would show great deference to the executive, even when military decisions affected American civilians.

The Supreme Court also has limited the President's power to use the military within the United States. In *Youngstown Sheet & Tube Co. v. Sawyer*,²⁹³ President Truman ordered the military to seize and operate steel mills that were about to be closed by a nationwide steelworker strike.²⁹⁴ The Supreme Court found President Truman's action uncon-

280. *Id.* art. II, § 2, cl. 1.

281. 10 U.S.C. § 331.

282. *Id.* § 332.

283. *Id.* § 333.

284. *See* U.S. CONST. art. I, § 8, cl. 16.

285. *See, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

286. 67 U.S. (2 Black) 635, 670 (1863). These cases concerned the disposition of vessels seized for violating the Union blockade of Southern ports. *Id.* at 637-44.

287. *Id.* at 670.

288. *Id.*

289. 323 U.S. 214 (1944).

290. *Id.* at 215, 219.

291. *Id.* at 216.

292. *Id.* at 223-24.

293. 343 U.S. 579 (1952).

294. *Id.* at 582-83.

stitutional.²⁹⁵ While the case is known mainly for its treatment of the constitutional scope of executive authority, the President used military means to exercise the power he claimed.²⁹⁶ President Truman asserted that he was authorized to act internally—in this case, to use troops to seize and operate American steel mills—as well as internationally.²⁹⁷ The Court rejected this argument, finding no specific authority from Congress for such an action.²⁹⁸ The President can act as Commander in Chief internally only under specific limits set by the Congress and the Constitution.²⁹⁹ President Truman's attempt to use troops within the nation's borders to execute policy is analogous to what some contemporary commentators have suggested.³⁰⁰

Yet, there is a great deal of latitude within those limits. In *Laird v. Tatum*,³⁰¹ the Supreme Court examined the Army's program of domestic surveillance of civilian political activity.³⁰² The military had been gathering intelligence on what it perceived as potential opponents in order to better prepare itself for domestic operations.³⁰³ In *Tatum*, these potential opponents were not the forces of enemy nations but individual activists and activist groups within the United States.³⁰⁴ The plaintiffs claimed that the Army's surveillance activities "chilled" their freedom of association rights in violation of the First Amendment.³⁰⁵ A five-to-four majority found the case nonjusticiable.³⁰⁶ As in *Korematsu v. United States*,³⁰⁷ individual rights in *Laird* gave way to the power of the executive's discretion to use the military internally.

b. executive power and immunity

Even if courts are willing to examine the actions of federal officials in cases in which deployment leads to unnecessary injuries, the courts will not necessarily hold officials responsible for those actions. If acting lawfully in the performance of his or her duties, the President and his or

295. *Id.* at 587.

296. *Id.* at 582.

297. *See id.*

298. *Id.* at 585-89.

299. *Id.*; *see also* U.S. CONST. art. I, § 8, cls. 12-13, 15 (stating Congress's authority to limit President); *id.* art. II, § 2, cl. 1 (vesting in President powers as Commander in Chief).

300. *See supra* note 14.

301. 408 U.S. 1 (1972).

302. *Id.* at 2.

303. *Id.* at 5.

304. *Id.*

305. *Id.* at 13.

306. *Id.* at 15.

307. 323 U.S. 214 (1944).

her civilian subordinates are immune from civil liability.³⁰⁸ The courts properly wish to leave the President free to act, personally and through civilian assistants, to decisively deal with violent disorder.³⁰⁹

The executive branch would be paralyzed if every decision it made were subject to suit for every error in judgment.³¹⁰ When armed soldiers are sent into a civilian area to conduct civil disturbance operations there is a great potential for improper use of force.³¹¹ In these matters, courts are unwilling to bind the hands of the executive too tightly by allowing liability for the improper use of military forces, unless the case is extreme.

Consequently, the check on that authority is institutional: If abuses of executive discretion are not checked within the executive branch itself, the legislature can check them.³¹² The judiciary, without the appropriate tools to analyze and evaluate the data that make up the final decision, will avoid judicial second-guessing. The discretionary function exception of the Federal Tort Claims Act explicitly recognizes this principle by specifically refusing to permit recovery for claims based upon "the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused."³¹³

308. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (1959).

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties . . . [and that] the threat [of such suits] might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id. at 571. The Speech and Debate Clause grants members of Congress broad civil immunity against suits related to their legislative duties. U.S. CONST. art. I, § 6, cl. 1. While there is no constitutional equivalent for the executive branch, there are common-law protections that protect the President from suits related to his or her official duties. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 n.31 (1982). In *Fitzgerald*, the Supreme Court held that the President had absolute immunity for actions taken within his authority. *Id.* at 756-57; see *infra* text accompanying notes 330-35. For a more detailed discussion of executive immunity for civil rights violations, see ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 8.6, at 402-19 (1989).

309. "As well stated by Mr. Justice White, 'The most basic function of any government is to provide for the security of the individual and of his property.'" *Krause v. Rhodes*, 471 F.2d 430, 437 n.2 (6th Cir. 1972) (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)).

310. See *Barr*, 360 U.S. at 571.

311. See *supra* part III.C.4.

312. U.S. CONST. art. I, § 8, cl. 16; see also *Fitzgerald*, 457 U.S. at 757-58 (noting that congressional check on President's powers provides counterbalance to privilege of absolute immunity from civil suits arising from official duties).

313. 28 U.S.C. § 2680(a) (1988); see also *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953) (holding federal government immune from liability for discretionary governmental actions).

On the other hand, freedom from liability for negligent use of the military, and the corresponding freedom to act, makes it easier for an executive to inappropriately commit troops. The executive, when acting within the wide latitude provided by the Constitution and by statute, has few checks on his or her actions.³¹⁴ The electorate may check the actions of the executive, but this alone cannot prevent an unnecessary or inappropriate deployment of troops because presidential elections only occur once every four years.³¹⁵ Further, the voters are likely to check the actions of the executive only if the employment is unsuccessful, for sometimes the decision to put troops on the streets impresses voters more than it dismays them.³¹⁶

Finally, the press may serve as a check on the President's actions.³¹⁷ However, if the voters support the action of the executive, the power of the press would seem of limited value as a counterweight to the privilege of absolute immunity. This is especially true if military forces are only used in situations involving discrete groups within society—such as residents of inner cities—instead of the majority of voters.

Today, a majority of citizens consider the military a highly efficient institution that can accomplish projects where other public bodies fail.³¹⁸ Faced by intransigent problems, like drug abuse and illegal immigration, and terrifying bursts of rage, like the Los Angeles riots, politicians cannot help but view the military as a panacea because today's leaders are more concerned with short-term political gain than by the danger the Founders recognized. Unfortunately, the Founders' warnings are forgotten today.

C. *Assessing Liability of Military Personnel*

Different military forces can be involved in civilian support operations, and liability varies depending on the status of the military unit. The organizations of most concern in this Comment are the National Guard on state active duty and troops of the active Army, Marine Corps and federalized National Guard units.³¹⁹

314. See *supra* part IV.B.2.a.

315. U.S. CONST. art. II, § 1, cl. 1.

316. See WEBSTER REPORT, *supra* note 64, at app. 16 (question 31) (reporting 80% of those surveyed in riot-stricken area named presence of National Guard troops as one major reason rioting stopped).

317. See *Nixon v. Fitzgerald*, 457 U.S. 731, 757-58 (1982).

318. See *supra* note 15 and accompanying text.

319. One force used in civilian support operations, the United States Coast Guard, is a part of the Department of Transportation in time of peace. 14 U.S.C. § 1 (1988). It does, however,

1. The National Guard under state control

When operating under state control, National Guard soldiers are subject to state laws governing immunity.³²⁰ Some states grant general civil immunity to soldiers for acts performed in the line of duty.³²¹ For example, in *Krause v. Rhodes*³²² the Sixth Circuit found that Ohio provided absolute civil immunity for actions taken by National Guard troops in the line of duty.³²³ It further found immunity for officers of the National Guard for the actions of the troops under them based on the theory that soldiers are servants not of the officers but of the state itself.³²⁴ The Supreme Court, no doubt stunned by the tragic events at Kent State, reversed the Sixth Circuit. However, it did acknowledge finding that in a claim under 42 U.S.C. § 1983³²⁵ good faith obedience to orders is a defense in an action against soldiers and junior officers.³²⁶

2. Liability of individual soldiers

In the past, the Supreme Court has granted military personnel acting in their official capacity a degree of immunity comparable to other officials. It held in *Howard v. Lyons*,³²⁷ a companion case to *Barr v. Matteo*,³²⁸ that a Navy captain's defamation of the civilian plaintiff occurred in the course of the captain's duties, therefore rendering the sailor immune from suit.³²⁹

In *Mitchell v. Forsyth*,³³⁰ however, the Court restricted the wide immunity granted in *Barr*. In *Mitchell*, the Attorney General of the United States was sued for authorizing illegal wiretaps.³³¹ The Court refused to grant the Attorney General absolute immunity even though the case involved an issue of national security.³³² The Court followed its ruling in

perform extensive civilian support missions. See Healy, *supra* note 14. A discussion of these missions is beyond the scope of this Comment.

320. See *Krause v. Rhodes*, 471 F.2d 430, 443 (6th Cir. 1972), *rev'd sub nom.* *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

321. See, e.g., CAL. MIL. & VET. CODE §§ 366, 392 (Deering 1985). California also provides for indemnification of soldiers for acts taken while on duty. *Id.* § 393 (Deering 1985 & Supp. 1992).

322. 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom.* *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

323. *Id.* at 442.

324. *Id.* at 443.

325. Civil Rights Act, 42 U.S.C. § 1983.

326. *Scheuer v. Rhodes*, 416 U.S. 232, 250 (1974).

327. 360 U.S. 593 (1959).

328. 360 U.S. 564 (1959).

329. *Howard*, 360 U.S. at 597-98.

330. 472 U.S. 511 (1985).

331. *Id.* at 513-14.

332. *Id.* at 520.

Harlow v. Fitzgerald,³³³ in which it held that when a "clearly established" right³³⁴ is violated by an executive official, the privilege of immunity does not apply.³³⁵ Thus, if soldiers, as members of the executive branch, violate a "clearly established" right, the soldiers may be personally liable.

The Eighth Circuit Court of Appeals applied limited immunity in a case involving the military in *Tigue v. Swaim*.³³⁶ The plaintiff was an Air Force captain who sued a military doctor for libel and false imprisonment in response to being removed from his job and involuntarily committed to a psychiatric ward.³³⁷ The defendant was granted an absolute privilege from suit because of the special importance of her job: determining whether personnel, such as the plaintiff, were suitable for continued work with nuclear weapons.³³⁸ The court of appeals noted, however, that there was no automatic immunity for military personnel performing their duties during peacetime.³³⁹

The Third Circuit, in *Martinez v. Schrock*,³⁴⁰ found that a military doctor was immune from malpractice liability for acts performed while on duty.³⁴¹ The court found the military doctor immune from suit for three reasons.³⁴² First, the surgeon was not acting by choice in selecting the patient or the circumstances of the operation, and therefore holding the doctor liable was unfair.³⁴³ Second, the plaintiff might have had a claim against the federal government under the Federal Tort Claims Act.³⁴⁴ Finally, holding military doctors personally liable would hinder recruiting and effective operations, especially in light of the limited salaries of military personnel.³⁴⁵

The rationale of the *Martinez* court also applies to troops called to duty within the United States. Like the doctor, they are not able to

333. 457 U.S. 800 (1982).

334. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Clearly established" rights are those "statutory or constitutional rights of which a reasonable person would have known." *Id.* For a discussion of the factors relevant to determining whether a right is clearly established, see 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES § 9.20 (1991 & Supp. 1992).

335. *Harlow*, 457 U.S. at 818-19.

336. 585 F.2d 909, 910 (8th Cir. 1978).

337. *Id.* at 911-12.

338. *Id.* at 914-15.

339. *Id.* at 913-14.

340. 537 F.2d 765 (3rd Cir. 1976), *cert. denied*, 430 U.S. 920 (1977).

341. *Id.* at 766.

342. *Id.* at 766-69.

343. *Id.* at 767.

344. *Id.* at 767-68; see *supra* part IV.A.

345. *Martinez*, 537 F.2d at 768-69.

choose their task, nor can they follow a plan they created.³⁴⁶ Second, the Federal Tort Claims Act could sometimes give injured parties relief.³⁴⁷ Finally, and most importantly, imposing personal liability could hurt military morale and preparedness because, with their limited resources, the threat of suit would be a major concern to military personnel.³⁴⁸ Still, the question of immunity for military personnel remains unsettled.

Both *Tigue*³⁴⁹ and *Martinez*³⁵⁰ concerned common-law torts, and while neither court had difficulty in concluding that military personnel should be immune from suit, the *Tigue* court noted that it might have ruled differently had the claim been based on a constitutional violation.³⁵¹ The limits the Supreme Court placed on the immunity of government officials in *Harlow v. Fitzgerald*³⁵² and *Mitchell v. Forsyth*,³⁵³ as well as the hasty retreat from its strong stand in *Gilligan v. Morgan*,³⁵⁴ could signal that the Court will allow suit against soldiers on the street for claims resulting from the use of deadly force. If so, it would only confirm the worst fears of the troops.

During the 1992 Los Angeles riots, the 40th Infantry Division of the California Army National Guard distributed a set of instructions entitled "Special Orders for Civil Disturbance Operations" to each soldier.³⁵⁵ The document noted that the right to self-defense is "a right under the law,"³⁵⁶ and that "the limitations [contained in the orders] are not intended to infringe on this right."³⁵⁷ While such statements would seem to grant the individual soldier wide discretion to determine the actions appropriate to a given situation, the special orders also stated detailed descriptions of when and how deadly force may be used.³⁵⁸ These statements seem contradictory and confusing to soldiers unfamiliar with the finer points of the law.³⁵⁹ This left some soldiers with an uneasy feeling

346. See *supra* part III.C.4.c.

347. See *supra* part IV.A.

348. *Martinez*, 537 F.2d at 769.

349. *Tigue v. Swaim*, 585 F.2d 909 (8th Cir. 1978).

350. *Martinez v. Schrock*, 537 F.2d 765 (3rd Cir. 1976), *cert. denied*, 430 U.S. 920 (1977).

351. *Tigue*, 585 F.2d at 912.

352. 457 U.S. 800 (1982).

353. 472 U.S. 511 (1985).

354. 413 U.S. 1 (1973).

355. See 40th Infantry Division (Mechanized), California Army National Guard, Special Orders for Civil Disturbance Operations (May 2, 1992) (on file with *Loyola of Los Angeles Law Review*).

356. *Id.*

357. *Id.*

358. *Id.*

359. See *supra* part III.C.

and, in their minds, the grim choice of being judged by twelve jurors or carried by six pallbearers.

The troops' concerns are not misplaced, for on March 4, 1993, Marine Gunnery Sergeant Harry Conde faced an Article 32³⁶⁰ hearing to determine whether he should face court martial for wounding a young Somali in Mogadishu during the civilian support mission in that nation.³⁶¹ Gunnery Sergeant Conde was in the passenger seat of his Humvee when he was suddenly accosted through a window by an unknown assailant.³⁶² The Marine reacted, firing his weapon.³⁶³ Fortunately for the Somali, who had been attempting to steal Gunnery Sergeant Conde's glasses, the wounds were not fatal.³⁶⁴

Operation Restore Hope had been billed as a "humanitarian mission," but two Marines had already been killed by Somali gunmen by the time of the February 2, 1993, incident.³⁶⁵ Gunnery Sergeant Conde's own commanding officer had been shot and badly wounded on a supply mission only two weeks earlier.³⁶⁶ The memory weighed heavily on the minds of the troops in the unit.³⁶⁷

"Gunnery Sergeant Conde had to make a decision [in what] he thought a life-threatening [situation] and he decided to pull the trigger. . . . You cannot ask someone to second-guess the judgement [that Gunnery Sergeant Conde] made. This is not the thing we bring Marines to court for," said the defendant's military attorney in her summation.³⁶⁸ She went on to describe the case as a test of the military's rules of engagement.³⁶⁹

The troops in Somalia closely watched the case.³⁷⁰ "You just can't imagine what it's like out there," said one Marine to a reporter.³⁷¹ Incidents of violence against Americans grew more common as the operation continued.³⁷² The Marine rules of engagement would seem to reflect that

360. 10 U.S.C. § 832 (1988) (U.C.M.J. art. 32).

361. Mark Fineman, *Use of Force at Issue in a Land of Anarchy*, L.A. TIMES, Mar. 5, 1993, at A12.

362. *Id.*

363. *Id.*

364. Mark Fineman, *Marine Offers Chilling Testimony in Shooting of Somali*, L.A. TIMES, Mar. 6, 1993, at A5.

365. See Fineman, *supra* note 361.

366. *Id.*

367. *Id.* at A13.

368. *Id.*

369. *Id.*

370. See Fineman, *supra* note 364.

371. See Fineman, *supra* note 361.

372. *Id.*

brutal reality, stating: "Nothing in these rules of engagement limits your right to take appropriate action to defend yourself and your unit."³⁷³

The situation in Somalia highlights the perils to both the soldiers and the civilians of using military forces to perform the basic law enforcement functions. Soldiers are forced to make split-second decisions in potentially life-threatening situations.³⁷⁴ Gunnery Sergeant Conde knew someone was attacking him and chose to fire.³⁷⁵ A young man was shot, and the Marine's decision was then examined in a judicial proceeding that could lead to his imprisonment.³⁷⁶ The liability of those who put Gunnery Sergeant Conde and the boy on a collision course, the civilian political leadership of the United States, remains unexamined.

V. CONCLUSION

The rules of the civilian world are utterly inappropriate in the soldier's world, and the judicial system is not prepared for the regular domestic use of the military. However, some government officials still consider the military the key to solving many of the nation's problems.³⁷⁷ The recent push to inject the military into the civilian arena reflects the American tendency to regard history as "bunk."³⁷⁸ The British knew well the danger, and much of English history is the story of struggles against the oppressive use of military power by tyrants.³⁷⁹ The Founders likewise knew the danger, and took pains to assuage the fears of the people that their new nation's military might someday be used against them.³⁸⁰

Sadly, this traditional skepticism seems to have been lost, and replaced with a utilitarian, "pragmatic" view of a huge military establishment now seemingly without a real mission.³⁸¹ Combined with a revived respect for the military's efficiency and strength following the Gulf War,³⁸² the sight of a largely inert military establishment fuels the growing perception that letting the military solve social problems is quite reasonable.³⁸³

373. *Id.* at A13.

374. *See* Fineman, *supra* note 364.

375. *Id.*

376. *See* Fineman, *supra* note 361.

377. *See supra* note 14 and accompanying text.

378. "History is more or less bunk." Henry Ford, *quoted in* JOHN BARTLETT'S FAMILIAR QUOTATIONS 587 n.2 (15th ed. 1980).

379. *See* Engdahl, *supra* note 20, at 2-18.

380. *See* THE FEDERALIST No. 29, *supra* note 51, at 183.

381. *See supra* note 14 and accompanying text.

382. *See* Ferraro, *supra* note 15.

383. *See* sources cited *supra* note 14.

The military's ability to provide rapid solutions is a powerful new tool to politicians accustomed to intractable problems.³⁸⁴ A number of executives have tried to use that power in the past.³⁸⁵ In April 1992, troops turned riot-torn Los Angeles into a calm, quiet city in less than two days. Today, the politicians and commentators who want to apply military efficiency to other problems fail to understand the dangers the Founders had seen firsthand.³⁸⁶ By failing to learn from the past, they may repeat history.³⁸⁷

The military view clashes with the notion of individual autonomy that guides civilian law. Military efficiency is based on the subordination of individual autonomy to the purpose of the organization.³⁸⁸ Immediately following the riots, Los Angeles was virtually crime free, but there was a price: Troops with automatic weapons set up road blocks, patrolled the streets and detained people found outside in violation of the curfew imposed by Los Angeles Mayor Tom Bradley.³⁸⁹

As the trend toward assigning internal missions to the military continues, the clash between military necessity and civilian concepts of justice will become more pronounced. The Supreme Court stated in *Gilligan v. Morgan*³⁹⁰ that there is no judicial role in the continuing oversight of military forces.³⁹¹ While *Scheuer v. Rhodes*³⁹² clarifies this holding,³⁹³ the judiciary is relegated to examining the military's actions only after disaster strikes.

The legal system is unprepared to confront the widespread use of military forces in civilian society. Political leaders are largely immune from judicial challenge.³⁹⁴ The soldiers are suspicious of just how much criminal and civil immunity they truly have,³⁹⁵ as they should be, for the issue of the personal liability of the troops remains unsettled.³⁹⁶ The web of judicial and statutory immunities makes it difficult for the civilian pop-

384. See *supra* notes 14-24 and accompanying text.

385. See *supra* part II.C.

386. See *supra* part II.A.

387. See *supra* part II.A.

388. The courts have recognized that the military differs from the rest of society in that the rights and privileges of its members may be infringed if required by military necessity. See *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986).

389. See *Seigle*, *supra* note 3.

390. 413 U.S. 1 (1973).

391. *Id.* at 11-12.

392. 416 U.S. 232 (1974).

393. *Id.* at 249-50.

394. See *supra* part IV.B.

395. See *supra* parts III.B.4, IV.B.

396. See *supra* part IV.C.2.

ulation to obtain judicial relief when military force causes injury.³⁹⁷ It is the worst of both worlds.

The military and the civilian leadership need the protection of these immunities to function in their respective capacities, yet these immunities conversely leave the citizenry largely unprotected from abuses and injuries. For that reason, most approaches to integrating military forces into a greater civilian support role are bound to fail. Merely giving military forces civilian police training eliminates the advantages that make using troops attractive in the first place. The troops become merely police officers in camouflage fatigues. Conversely, using police in a paramilitary role turns them into soldiers.³⁹⁸

Alternatively, the courts may choose the civilian model and strictly assign responsibility for tragic decisions, minimizing the qualified immunity for executive functions. However, in such a situation the military asset of efficiency is lost precisely because it restrains officials. The Supreme Court tried to find middle ground in *Scheuer*, acting in the aftermath of a shocking tragedy to limit the use of the military by state officials. However, by restricting the actions of the military commander, the Court rendered the military a nonmilitary force, that is, police officers in all but name. If a situation requires only peace officers, there is no reason to involve the military. Except in the most dire of emergencies, such as a full-scale insurrection, the military has no business on the streets of America's cities.

In the military realm, success is paid for in lives. Casualties are a part of the calculus. On foreign battlefields, the American military has earned the respect of friend and foe. Yet the military's ability to project decisive power is absolutely unacceptable for use at home no matter how great the temptation. Today, some who have forgotten the teachings of our history feel that using the military internally is merely common-sense pragmatism in a time when the nation must maximize the return on every dollar. It is not worth the risk.

*Kurt Andrew Schlichter**

397. See *supra* part IV.

398. See *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975). Such was the case at Jackson State, where heavily armed police officers reacted to a sniper with massive return fire, resulting in the deaths of two students. *Id.* at 1270-71.

* This Comment is dedicated to my family as well as to the soldiers who served with me in the Persian Gulf in 1991 and on the streets of Los Angeles in 1992. The views expressed in this Comment are my own and do not necessarily represent the official views of any organization or institution.

